***United States Court of Appeals***

***for the Second Circuit***


# REPLY BRIEF

NOS. 74-1579 & 74-1568

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PETER J. BRENNAN, Secretary of Labor,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
and UNDERHILL CONSTRUCTION CORPORATION,

Respondents.

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UNDERHILL CONSTRUCTION CORP. and DIC
CONCRETE CORP., Individually and as
participants in a Joint Venture known
as DIC-UNDERHILL, A JOINT VENTURE,

Petitioners,

v.

PETER J. BRENNAN and OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.



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ON PETITIONS TO REVIEW AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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REPLY BRIEF FOR THE SECRETARY OF LABOR

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# REPLY BRIEF FOR THE SECRETARY OF LABOR

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## Introduction

In our main brief we demonstrated that the administrative law judge and the Occupational Safety and Health Review Commission erred in vacating the Secretary's

citation for a nonserious violation of 29 C.F.R. 1926.250(b)(1),[1] which prohibits the storage of material within 10 feet of exterior walls, on the ground that the standard was inapplicable to construction materials overhanging the edges of the eleventh and fourteenth floors of buildings being constructed by Dic-Underhill, and that none of Dic-Underhill's employees was exposed to the danger of falling materials (Brief, pp. 2-3, 7-8). We consider Dic-Underhill's reply to this argument (Respondent's brief, pp. 19-23) in Point I below.

Dic-Underhill has cross-petitioned for review from the Commission's order sustaining the Secretary's citation for a serious violation of 29 C.F.R. 1926.500(d)(1),[2]

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1/ 29 C.F.R. 1926.250(b)(1) provides:

> (b) Material storage. (1) Material stored inside buildings under construction shall not be placed within 6 feet of any hoistway or inside floor openings, nor within 10 feet of an exterior wall which does not extend above the top of the material stored.

2/ 29 C.F.R. 1926.500(d)(1) provides:

> (d) Guarding of open-sided floors, platforms, and runways. (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toe-board wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

which requires the guarding of open-sided floors, platforms, and runways. The company contends that this violation was not established by substantial evidence (Respondent's brief, pp. 13-18). We show in Point II below that there was substantial evidence to support the citations.

POINT I

It is not disputed that an OSHA inspector observed shoring material 4 X 4 inches and eight feet in length overhanging the edge of the eleventh floor of a building (Tr. 12) being constructed by Dic-Underhill (Tr. 6) and that two bricklayers who were not Dic-Underhill's employees were working on a scaffold on the third or fourth floor below these stacked materials (Tr. 13). It is also undisputed that the inspector observed steel braces stacked so as to overhang the edges of the fourteenth floor of another building (Tr. 15), being constructed by Dic-Underhill and that people "of different trades were walking by" under these stacked beams (Tr. 13). However, as we indicated in our main brief, the administrative law judge ruled that no violation of 29 C.F.R. 1926.250(b)(1) was established because (1) the standard applies only to material stacked at <u>interior</u> openings and not at <u>exterior</u> wall edges (A. 58-59); and, alternatively, because the only persons endangered by the possibility that the stored material would fall were workmen not employed by Dic-Underhill (A. 59).

Dic-Underhill relies upon the judge's decision on these points (Brief, pp. 19-24) and in addition argues that the material was not "stored" within the meaning of the standard, since it was to be hoisted to other floors and re-used; and that it was not stored near "an exterior wall which [did] not extend above the top of the material" because no exterior walls had been constructed beyond the third or fourth floor levels (Brief, p. 24). These contentions are without merit. Plainly the standard is intended to apply to temporarily stored materials since it is a construction standard, and construction materials normally are "stored" only until they are incorporated into the building structure or re-used like the concrete forms and steel tie rods here involved. Further, if the exterior walls had not reached the eleventh and fourteenth floor height, they obviously did not extend above the height of the materials stored, and the standard was applicable.[3/]

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3/ Dic-Underhill also argues that the stacked forms could not be hoisted to the next floor unless stacked at the building edge (Brief, p. 25), but this plainly does not excuse there being stored at the building edge until they were ready to be moved by crane and cable.

The question of employee exposure, with which we dealt in our main brief (pp. 9-17),[4/] has since been the subject of discussion by the Fourth Circuit in Brennan v. Gilles and Cotting, Inc. and OSHRC, No. 73-2471, decided October 18, 1974. The Fourth Circuit noted that (slip opinion, p. 22):

> The question of whether a citation can issue solely on the basis of employee access to the zones of danger created by a safety violation, or whether the specific evidence of employee presence in the zone of danger is required, is important to enforcement of the Act. If access alone is sufficient to show a violation, the Secretary will often be able to make out a case solely on the basis of the testimony of the compliance officer. If, however, proof of employee presence in the zones of danger is required, then unless the compliance officer chances to see employees in a danger zone at the time of his inspection, the Secretary will have to depend on workers' willingness to testify against their employers under the anti-retribution umbrella of § 11(c)(1) of the Act. Recalcitrant employers may be able to impede enforcement of the Act by refusing to correct safety violations disclosed by an inspection unless for each and every violation the Secretary is able to marshal employee testimony that, e.g., dangerous equipment available for use was actually used or that hazardous areas accessible to workers were at one time passed through or occupied.

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4/ We argued in our brief that there was potential exposure of Dic-Underhill's employees because Dic-Underhill had 437 employees at the site all of whom were exposed to the hazardous condition created by the overhanging beams and braces (Brief, pp. 9-17).

The court concluded that "the issue of whether a citation can be predicated on access alone, or whether evidence of actual employee exposure to a hazard is required, can be answered either way consistent with the statutory purposes of the Act" (slip opinion, p. 23). It then remanded the case to the Commission for an explicit determination of this vital issue (slip opinion, p. 25, 33).

We do not agree with the Fourth Circuit's conclusion that the Act can perhaps be read to excuse hazards to which an employee has access. The statutory interpretation question is treated extensively in our main brief (pp. 9-16) where we show that Congress intended to protect employees from exposure to potential hazards as well as from exposure to immediate hazards on the job site.[5/] We need only emphasize here, as this Court has, that the preeminent purpose of the Act is "accident prevention".

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5/ We point out in this connection that the language of 29 U.S.C. 654(a)(2), under which this case arises, is sufficiently broad to permit this construction. It reads without limitation:

> § 654(a) Each employer—
>
> (2) shall comply with occupational safety and health standards promulgated under this chapter.

Dic-Underhill cites instead as the controlling statute Section 5(a)(1) of the Act, the so-called "general duty" clause (Brief, p. 19). However, the general duty clause is not involved in this case.

Brennan v. OSHRC and Gerosa, Inc., 491 F. 2d 1340 (C.A. 2, 1974). It ill serves that basic purpose to allow a reading of the Act which so limits employee protection.

Nor do we agree with the Fourth Circuit's conclusion that the Commission need be deferred to for its interpretation of the statute. This conclusion represents a misinterpretation of the respective functions of the Secretary and the Commission under the Act, and is wholly inconsistent with congressional intent. See, Dale M. Madden Construction, Inc. v. Hodgson, etc., ___ F. 2d ___ (C.A. 9, 1974, No. 72-1874 decided July 29, 1974); Brennan v. Southern Contractors Service, 492 F. 2d 498, 501 (C.A. 5, 1974). Thus, as the court held in Brennan v. Southern Contractors, supra, 498 F. 2d at 501:

> Since . . . the Secretary is authorized to promulgate regulations, his interpretation is controlling as long as it is one of several reasonable interpretations, although it may not appear as reasonable as some other.

Moreover, as the Ninth Circuit recently observed in Dale M. Madden Construction, Inc. v. Hodgson, supra, ___ F. 2d at ___:

> Unlike the NLRB and the FTC, [the Commission] has neither prosecution nor enforcement powers. Those have been exclusively delegated to the Secretary.
>
> Policy making is arguably a by-product of the Commission's adjudication. But the Act imposes policy-making responsibility upon the

> Secretary, not the Commission. Whatever 'policies' the Commission establishes are indirect, only those established by the Secretary are entitled to enforcement and defense in court.

Lacking "policy-making" authority, the Commission clearly plays a limited role in carrying out the purposes of the Act, and there is certainly no warrant to give its interpretation of the statute greater credence than the interpretation of the Secretary.[6/]

Alternatively, we argued in our main brief that an employer who controls a work place is liable for the violation of safety standards whether his employees or other employees are endangered. The Fourth Circuit in Gilles and Cotting again concluded that "the question of

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6/ The Commission's function under the Act is to sit as an administrative court empowered (1) to determine whether alleged violations contested by employers have been factually established by the Secretary, and (2) to assess civil penalties for such contested violations within strict statutory bounds, 29 U.S.C. 651(3), 659(c), 661(i), 666(a) through (d), 666(i). By contrast, the Secretary is charged with all of the Act's major regulatory functions -- the powers to designate target industries for intensive inspection, to inspect and cite, to promulgate posting, reporting, and inspection regulations, to issue binding safety and health standards, to propose penalties, to initiate or respond to court proceedings, to compromise or mitigate assessed penalties, to approve and finance State plants, and to interpret the Act by rule. 29 U.S.C. 651(3) and (10), 655, 657(a) through (g), 658-600, 662-663, 667, 670, 672-673; see Leg. Hist. 152, 852. In sum, it is the Secretary's, not the Commission's, interpretation of the Act that represents "a contemporaneous construction * * * by the men charged with the responsibility of setting [the statute] in motion * * * while [it is] yet untried and new". Power Reactor Development Co. v. IUE, 367 U.S. 396, 408 (1961).

whether a general contractor should be concurrently responsible for the safety of subcontractors workmen . . . can be answered either way" (slip opinion, p. 17). The court then deferred to the Commission, observing: "Since the Commission has held that a general contractor should not be held responsible jointly with a subcontractor for the safety of the latter's employees, we accept that decision as binding" (slip opinion, p. 20).

This too, we submit, was wrongly decided by the Fourth Circuit. If the statutory language and the statutory purpose permit a decision of the question either way, the goals of the Act would be furthered by a policy of employer liability predicated upon employer control over the worksite. See our main brief, pp. 15-17.[7/] However,

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7/ Dic-Underhill argues that the Secretary has promulgated a regulation which supports the Commission's holding that an employer may only be cited where non-compliance affects his own employees. This assertion is without merit. 29 C.F.R. 1910.5(d) merely states that:

> In the event a standard protects on its face a class of persons larger than employees, the standard shall be applicable under this part only to employees and their employment and places of employment.

The purpose of this standard is plainly to provide an explicit rule of construction which assures that standards will be uniformly interpreted and applied consistent with the Secretary's powers under the Act -- powers which encompass the authority to protect employees as a class, as distinguished from individuals like by-passers or trucking-accident victims who are not employees at all. Accordingly the most reasonable interpretation of the above-quoted language is one which views it as contemplating employees generally rather than importing a restrictive limitation which cannot reasonably be inferred.

this Court need not reach this issue since Dic-Underhill is liable here for the hazard it erected and controlled which potentially threatened its 437 employees on the job site.

POINT II

The citation issued to Dic-Underhill pursuant to 29 C.F.R. 1926.500(d)(1),[8] and sustained by the administrative law judge and the Commission, described the alleged serious violation[9] as follows:

> For failure to ensure that every opensided floor or platform 6' or more above adjacent floor or ground level shall be guarded by a standard railing or equivalent as specified in paragraph (f)(i) of this section.
>
> A) (2) Two field engineers surveyors working in building 'D' at edge of 15th. floor checking targets, without safety belts, and perimeter guarding was not provided.

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8/ See note 2, supra.

9/ A serious violation is defined in 29 U.S.C. 666(j) which provides:

> (j) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

B) In building 'B' on 17th. floor a carpenter working on forms 15th. feet from edge. Perimeter guarding not provided.

C) In building 'B' on 18th. floor, two men working with cement finishing machines (giraffes) on overhead about 10 ft. from edge, perimeter guarding not provided.

There is no merit to respondent's contention that these violations were not proved by substantial evidence (Brief, pp. 11-18).

A. Inspector Grudzwick testified that on the fifteenth floor of building D there were two surveyors employed by Dic-Underhill standing "right on the edge" and "checking targets" (Tr. 19). There was no perimeter guarding on that floor and the men were not wearing safety belts, nor any other form of protective equipment.

The testimony was not contradicted.[10/] Since it is beyond dispute that a fall from the fifteenth floor would have caused death or serious harm, no more was necessary to establish a serious violation of 29 C.F.R. 1926.500(d)(1) which requires guarding of open-sided floors unless employees work in safety belts.[11/]

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10/ In fact the employer offered no evidence at all at the hearing. Mr. Grudzwick was the sole witness.

Respondent argues (Brief, pp. 13-15) that the Secretary was required to prove that the surveyors could have done their work had barricades been installed. However, in the first place, the violation alleges also that the surveyors were not wearing safety belts to mitigate the hazard resulting from the lack of a guard rail. Moreover, it is by no means clear that the surveyors could not have "checked targets" with guard rails in place, since the record is devoid of any specific information as to what "checking targets" involved.[11/]

Further, respondent misconceives the burden of proof that the Commission's rule imposes upon the Secretary. The Secretary met his burden by showing non-compliance with a safety standard. The burden then shifted to the employer to prove as an affirmative defense that the two unprotected employees could not have done their work had the guard rails been installed or had they worn safety belts. See 29 U.S.C. 661(f); Fed. R. Civ. Pro. 8(c); Mastro Plastics Corp. v. N.L.R.B., 354 F. 2d 170, 176-177 (C.A. 2, 1965), certiorari denied, 384 U.S. 972.

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11/ Mr. Grudzwick at first said he didn't believe they could have done their job with perimeter guarding "but they could have worn a safety belt" (Tr. 55). Later he admitted that he did not know what checking targets involved (Tr. 57), and "really did not know whether or not their work could have been accomplished if there was perimeter guarding (Tr. 59).

B. Mr. Grudzwick testified that on the seventeenth floor of building B there was no perimeter guarding and he observed a carpenter with hammer in hand who said he was working on forms about fifteen feet from the open floor edge (Tr. 22). The company gave his name as LoBalbo (Tr. 23), furnished his address and told Mr. Grudzwick that he worked for Dic-Underhill and was a member of the carpenters' union (Tr. 22). The carpenter was not wearing any type of lifeline or safety belt (Tr. 26). Since a drop from the seventeenth floor would have caused this employee's death or serious harm, a serious violation of the perimeter guarding safety standard was established by this uncontradicted testimony.

Respondent argues, unaccountably, that it was not established that the carpenter was employed by Dic-Underhill or that he was authorized to be where he was on the theory that "Dic-Underhill cannot be responsible . . . for hazards located in areas in which its employees are not authorized to work" (Brief, p. 15). Since Dic-Underhill did not dispute the compliance officer's testimony before the trial examiner, he cannot now raise these factual issues for the first time before this Court.

C. On the eighteenth floor of building "B" inspector Grudzwick also found the perimeters unguarded and he observed two men with a cement finishing machine or "giraffe" (Tr. 27). He described the giraffe as "a

machine with a long extension on it that has a sander on the end of it" used for sanding the overhead ceiling (Tr. 27). The men were moving the machine (which was equipped with wheels) around the floor while sanding the overhead, and were within ten feet of the edge (Tr. 28). Mr. Grudzwick assumed that "they would move further away than ten feet from the edge and also . . . would get closer to the edge" (Ibid.). The men were not wearing any safety belts or lifelines (Tr. 29). Since a fall from the eighteenth floor would clearly have killed or seriously injured these employees, a serious violation was established.

Respondent, again raising factual issues which were not raised in the proceeding below, suggests that it cannot be concluded that these employees were going to sand the entire ceiling and it "is more likely that they were only working on isolated rough spots" (Brief, p. 17). This is sheer speculation which in no way refutes the testimony of the compliance officer.

As to each of these three violations, respondent argues that the citation must fail because "there was no employee exposure to the hazard at the time and place of the alleged violation" (Brief, p. 16). This contention reflects the views of Chairman Moran, as expressed in his dissenting opinion, that the violation with respect to the surveyors was not proved because it was not established

that their work could have been accomplished with perimeter guards in place (A. 74-75), and that "[a]s to the other three workers, no evidence was introduced to show that their jobs required them to move from the location where they were observed to positions closer to the edge of the floors on which they were working" (A. 75). The Chairman expressed the view that "the fact they could have moved closer is not controlling" (A. 76).

We disagree. It defies common sense to suggest that the OSHA inspector was required to wait to find these employees and their equipment in actual danger to falling over the unguarded floor edges before issuing a citation. As the administrative law judge noted in Secretary v. Allied Electric, OSHRC No. 433, June 23, 1973, this "would result in a cat and mouse game and would expose an employee to a hazard prior to the Secretary being able to require it to be corrected" (1 OSHRC Rpts. at 451).

## CONCLUSION

For the foregoing reasons, and those set out in our main brief, the Commission's order dismissing the Secretary's citation for the nonserious violation should be reversed, and the Commission's order sustaining the Secretary's citation for a serious violation should be affirmed.

Respectfully submitted,


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NOVEMBER, 1974.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 1974, I served the foregoing reply brief upon counsel for all parties, by causing copies to be mailed, postage prepaid, to:

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